IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 61

JOHN H. CRUMADY,

Petitioner,

vs.

JOACHIM HENDRIK FISSER, her engines, tackle, apparel, etc., and JOACHIM HENDRIK FISSER, and/or HENDRIK FISSER,

Respondents,

vs.

NACIREMA OPERATING CO., INC.,

Impleaded Respondent.

BRIEF FOR IMPLEADED RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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No. 968

JOHN H. CRUMADY,

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Opinions of the Courts Below.

The opinion of the District Court for the District of New Jersey is reported in 142 Fed. Supp. 389, (L16a)[1]. The opinion of the Court of Appeals for the Third Circuit is reported in 249 Fed. (2d) 818 (LP29). The opinion of the Court of Appeals on petition for rehearing is reported in 249 Fed. (2d) 821 (LP36).

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[1] References are: L—libellant's appendix; LP—libellant's petition for certiorari.

Jurisdiction.

The judgment of the Court of Appeals was entered on September 30, 1957, (LP35). The order denying rehearing was entered on December 5, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1).

Questions.

1. Does not the determination of the Court of Appeals that the vessel was not unseaworthy upon the theory advanced by the petitioner in the trial court preclude the assertion of a different theory of unseaworthiness in this Court?

2. If a new theory of unseaworthiness is asserted by a petitioner after the trial of an action in admiralty, should not the case be remanded to the District Court for factual findings after a full opportunity is given to all parties to be heard?

Statement of the Case.

It is not disputed that on January 2, 1954, the petitioner, while in the course of his employment with the respondent impleaded as a longshoreman, was discharging a cargo of lumber from the *Joachim Hendrik Fisser* which was alongside a bulkhead at Port Newark, New Jersey, on the navigable waters of the United States.

It also is not disputed that the petitioner, together with other longshoremen, came aboard the vessel at approximately 8:00 a.m. on the day of the accident and was working in the No. 1 hatch of the vessel at approximately 9:00 a.m. when a wire rope topping lift which was attached to

the port or offshore boom parted. The boom fell into the hatch and struck the petitioner.

To recover for the injuries thus incurred, a libel *in rem* was filed in which it was alleged that the injuries sustained by the petitioner were caused without any fault or negligence on his part but solely through the fault, carelessness and negligence of the claimants (*sic*) and respondents (*sic*) (L8a), and at the pretrial hearing it was stated that the injuries resulted from the unseaworthiness of the vessel, her tackle, apparel and furniture.

The respondent denied that the vessel was unseaworthy, contended it was guilty of no negligence and filed an impleading petition against the impleaded respondent under the 56th Admiralty Rule, seeking indemnity for any damages which would be imposed upon it by the libellant.

At the trial, the testimony offered by the petitioner was directed to two theories upon which a determination that the vessel was unseaworthy could be predicated. One was that Exhibits L-10 and L-13, which were conceded by all witnesses to be in such condition as to render their use as a topping lift unsuitable and dangerous (L19a), were, in fact, parts of the topping lift to which the port boom was attached on the day of the accident. The other theory of liability for unseaworthiness asserted by the petitioner in the trial court was predicated upon the stipulation of the parties that the vessel provided an electric winch which was equipped with a device which interrupted its operation upon the application of a burden exceeding 100% of its capacity. Because of the fact that the gear and booms had a safe working load of 3 tons and the winch, which was the source of the power applied to such gear, had a capacity before the operation of the cutoff device of more than 6 tons, the theory was projected and accepted by the trial

court that the vessel was unseaworthy because of this improper combination of gear (L33a).

The respondent sought to escape liability for the alleged unseaworthiness of the vessel upon the theory that certain of the ship's tackle and gear were moved to a position which was testified to by one of the ship's officers but which was sharply contradicted by the testimony presented on behalf of the impleaded respondent, and, in addition, contended that there was a jamming of two timbers under the coaming of the No. 1 hatch, as a result of which an undue strain was placed upon the topping lift.

The trial court, in its opinion (L30a), recognized the conflicting testimony as to the alleged jamming of the timbers (L20a, L21a) but ignored the conflict in the testimony as to the movement of the gear, stating that it appeared "without contradiction" that the gear was moved to a position (L30a) which imposed an excessive burden upon the topping lift, as a consequence of which the injuries resulted from the active negligence of the impleaded respondent (L33a) so to entitle the respondent to full indemnity against it (L37a).

Its finding in that respect was asserted by the impleaded respondent to be erroneous because of the failure of the trial court to appraise the credibility of the conflict in the testimony in that regard. That circumstance was not reviewed in the Court of Appeals because of the conclusion in that Court that the initial finding of the trial court that the combination of the cutoff device in the winch with the other gear of limited capacity less than that possessed by the winch would not render the craft unseaworthy.

In those circumstances, then, there has been no determination that any action of the employees of the respondent impleaded caused the vessel to be unseaworthy.

In addition to its contention regarding the failure of the trial court to appraise the credibility of the conflicting testimony concerning the position of the gear before the accident, the impleaded respondent raised certain substantial legal objections to the allowance of indemnity against it which were not passed upon by the Court of Appeals because of its conclusion that the vessel was not unseaworthy (LP34).

It is the contention of the impleaded respondent, in light of the testimony presented in the District Court and the theory upon which the case was tried, that the ground of unseaworthiness alleged in the petition for certiorari can not be raised at this stage of the proceedings, or if it is concluded that such a theory can be asserted after the trial of the action and without factual findings thereon that manifest justice requires a remand for findings of fact thereon.

ARGUMENT.

The decision of the United States Court of Appeals is not in conflict with the decisions of this court or with any other Court of Appeals.

Since the decision of this court in *Seas Shipping* v. *Sieracki*, 328 U. S. 85 (1946), it must be regarded as settled that a longshoreman who is injured aboard a vessel is entitled to the same benefits as those conferred upon a member of the ship's company by reason of the decision in *The Osceola*, 189 U. S. 158 (1903). There is no suggestion in the opinion of the Court of Appeals, for the review of which the present petition has been filed, that it is in any way in conflict with that principle. It is suggested in the petition for certiorari that the decision of the

Court of Appeals in the present case reflects of the so-called "control test" which was repudiated by this Court in *Petterson* v. *Alaska SS. Co.*, 347 U. S. 396 (1954).

That such is not the case is evident from the opinion of the same Court of Appeals in *Feinman* v. *A. H. Bull SS. Co.*, 216 Fed. (2d) 393 (3d Cir. 1954), which recognized that a vessel could not escape liability for injuries consequent upon its unseaworthy condition upon the theory that such conditions were caused by other persons to whom control of the vessel was temporarily given. The argument of the petitioner that the opinion of the Court of Appeals was predicated upon the repudiated "control test" ignores the fundamental principle that any condition of a vessel does not amount to unseaworthiness.

It is, of course, true that the obligation of a vessel or its owner to provide a seaworthy craft is a non-delegable one and is a variety of liability without fault, *Seas Shipping* v. *Sieracki, supra; Mahnich* v. *Southern SS. Co.*, 321 U. S. 96 (1944). That principle, however, goes no further than to establish that a person in a status similar to that of a seaman may recover damages for injuries received as a consequence of the unseaworthiness of a vessel without establishing negligence or fault on the part of the craft or its owner. It does not result in the imposition of liability upon a vessel or its owner for injuries sustained by a person akin to a seaman simply because he is hurt aboard such vessel. Where equipment on a ship is reasonably fit for the purpose for which it is intended or is reasonably safe for the purpose for which it is to be used, the fact that the equipment is used in a negligent manner does not make the craft unseaworthy.

In *Manhat* v. *United States*, 220 Fed. (2d) 143, cert. den'd. 349 U. S. 966 (1955), the fact that a lifeboat which

was properly fitted with seaworthy releasing gear but which was not furnished with additional equipment which would prevent its fall if the gear were not properly used was not sufficient to impose liability upon the vessel for being unseaworthy.

Similarly, in *Freitas* v. *Pacific-Atlantic SS. Co.*, 218 Fed. (2d) 562 (1955) it was held that a longshoreman could not recover against a vessel for unseaworthiness where he was injured because of the failure of a winch operator to perceive that a shackle had caught against a strongback of a shelter deck hatch because of the failure of the longshoremen completely to uncover the hatches.

If the theory of the petitioner concerning unseaworthiness as asserted in the present petition is correct and the movement of the preventer and guys to the positions assumed by the trial court to have been admitted resulted in the application of extraordinary strain to the topping lift, the remarks of the court in the *Freitas* case, *supra*, in distinguishing the case of *Petterson* v. *Alaska SS. Co.*, *supra*, are particularly pertinent, for there it was said: [page 564 of 218 Fed. (2d)]

> "The *Petterson* case is inapposite. Unlike the situation in Petterson, the accident in this instance was directly brought about by an improper, if not foolhardy, use of the ship's gear. • • •"

To like effect is *Berti* v. *Compagnie de Navigation Cyprien Fabre*, 213 Fed. (2d) 397 (2d Cir. 1954) in which it was held that a plaintiff who was standing on a hatch cover and who was dumped into the hold below when a cable from the winches dislodged a supporting beam had not established that the vessel was unseaworthy.

Since there was no testimony introduced in the trial court that the fellow employees of the petitioner were

incompetent, the remarks of the Court in the *Berti* case, *supra,* are apposite. There it was said [at page 400 of 213 Fed. (2d)]

> "* * * Since there is no claim here that the longshoremen were incompetent we think Alaska SS. Co. *v.* Petterson, *supra,* not pertinent. If plaintiff's injuries resulted solely from the manner in which the work was done under American's supervision, he has no recourse against Cyprien."

The case of *Grillea* v. *United States,* 232 Fed. (2d) 919 (2d Cir. 1956), relied upon by the petitioner, does not assert a different principal for the court there recognized the distinction implicit in the doctrine of liability for unseaworthiness that such condition does not result for transitory events and permitted recovery solely because a proper hatch cover which was placed over a wrong pad-eye became an integral part of the vessel and rendered it unseaworthy. See also: *Poignant* v. *United States,* 225 Fed. (2d) 595 (2d Cir. 1955).

While the salutary purpose of imposing upon the shipping industry the burden of responding in damages to persons injured by reason of the negligence or unseaworthiness of the vessel enunciated in *Seas Shipping* v. *Sieracki, supra,* is recognized, nevertheless, to impose liability upon a vessel upon a theory not advanced in the trial court and to subject the impleaded respondent which has already provided the petitioner with the medical care and benefits provided by the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. §901 *et seq.* 44 Stat. 1424) to the hazard of responding in indemnity is not in accord either with established principles of law or of economic or social necessity. Such result creates a kind of unlimited recovery without fault in substitution for the predictable

liability without fault of an employer which is already available to the petitioner by reason of the provisions of the Longshoremen's and Harbor Workers' Compensation Act. If such an extension of the doctrine of liability for an assumed unseaworthiness is to be for the first time adopted, it should not be adopted until there has been an opportunity to present testimony and have express findings of fact in the trial court in that respect.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Nacirema Operating Co., Inc.